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Court of Appeal,
First District, Division 5, California.

JAIME WING, ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS, LLC,
Defendant and Appellant.

No. A105906.

(San Mateo County Super. Ct. No. 432021).

Oct. 3, 2005.

Bruce Lee Simon, Cotchett & Pitre, Burlingame, CA, for Plaintiff-Respondent.

Donald M. Falk, Mayer, Brown, Rowe & Maw LLP, Palo Alto, CA, Amor Esteban, Drinker, Biddle & Reath, San Francisco, CA, for Defendant-Appellant.

JONES, P.J.

Plaintiff Jaime Wing and two coplaintiffs filed suit against Cingular and other wireless service providers to challenge the practice of charging customers a fee for local number portability. Of the three named plaintiffs, only Wing is a customer of Cingular. Cingular petitioned to compel arbitration of plaintiff Wing's claims based upon an arbitration clause included among the terms and conditions of the wireless service agreement.[1] The trial court denied the petition, citing two grounds: (1) Cingular failed to establish the existence of an agreement to arbitrate between Cingular and

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[1] The plaintiffs' lawsuit named other wireless service providers as well, but this appeal concerns only Cingular. Cingular sought to compel arbitration only by plaintiff Wing because Wing is the only named plaintiff who is a Cingular customer.

Wing, and (2) the alleged arbitration agreement is unconscionable and unenforceable.

In this appeal by Cingular, we initially reversed the trial court's order, but the Supreme Court has remanded this matter to us for reconsideration in light of the recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*). Upon reconsideration, we conclude that the arbitration clause at issue here is unconscionable and unenforceable.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Wing purchased a wireless telephone from the Costco store in South San Francisco in April 2001. The phone came in a shrink-wrapped box inside a cardboard sleeve, and on that cardboard sleeve were instructions for activating wireless service with Cingular. Beneath the shrink wrap on top of the box were several documents, including a notice advising the customer not to open the box until service had been activated. Also on top of the box were a welcome letter, the written terms and conditions of Cingular's wireless service, and a handbook of Cingular services. The written terms and conditions of Cingular's wireless service included an arbitration clause requiring arbitration of all disputes arising out of the wireless service agreement.

In April 2003, Cingular began charging its customers a "Regulatory Cost Recovery Fee" that included a fee for local number portability. In June 2003, plaintiff Wing and her two coplaintiffs brought a class action alleging unfair business practices under the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), violations of the False Advertising Act (Bus. & Prof.Code, § 17500 et seq.), fraud, breach of

contract, and breach of the implied covenant of good faith and fair dealing.[2]

In July 2003, Cingular modified the arbitration clause in its wireless service agreement, making it more advantageous to the customers, and Cingular notified its customers of the change by way of an insert included with the customers' monthly bill. Both the original and the modified versions of the arbitration clause provide that either party may bring an individual action in small claims court, notwithstanding the agreement to arbitrate all disputes. The modified version significantly changed the procedure for payment of fees: If the customer initiates arbitration, Cingular will promptly reimburse the customer for the filing fee. Moreover, Cingular will pay all filing, administration, and arbitrator fees unless the arbitrator finds that the customer's claim is frivolous, in which case payment of fees will be governed by the American Arbitration Association (AAA) rules and thereby appor-

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[2] Plaintiffs brought their lawsuit not only as a class action but also on behalf of the general public. At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel ... or any [qualified] city attorney ... or by *any person acting for the interests of* itself, its members or *the general public*." (Bus. & Prof.Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal. Whether plaintiff Wing is entitled to pursue her claims under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions that plaintiff's claims under the UCL should be dismissed are not properly addressed to us.

tioned by the arbitrator. And, if the arbitration award is equal to or greater than the customer's demand, Cingular will pay the customer's attorney fees and expenses.

Most significantly, both the original and the modified version of the arbitration clause allow only individual claims to be heard in arbitration. The modified version reads as follows: "The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim.... YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that [if] this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void." (Capitalization in original.)[3]

Based upon the arbitration clause in its wireless service agreement, Cingular petitioned to compel arbitration of plaintiff Wing's claim. Plaintiff opposed the petition, arguing that the arbitration clause was procedurally and substantively unconscionable. Plaintiff Wing also disputed the existence of an arbitration agreement. Wing submitted a declaration to the court stating that when she activated her account with Cingular she was not informed of the arbitration provision and she did not recall receiving any written agreement: "I do not think I ever got an agreement setting forth the terms of my service other than what was included in my bills."

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[3] The original version provided that the arbitrator had no authority to order consolidation or class arbitration.

In response, Cingular presented evidence that the shrink-wrapped box in which customers received their Cingular phones at Costco stores contained the written terms and conditions of Cingular's wireless service. Cingular presented a copy of the written terms and conditions that were given to customers at the time plaintiff bought her phone.

The trial court identified two reasons for denying Cingular's petition to compel arbitration. First, the court found that Cingular failed to prove an agreement to arbitrate. Second, the court found that even if an arbitration agreement exists the agreement is unconscionable. In particular, the court found that the arbitration agreement and its July 2003 modification were procedurally unconscionable, having been presented on a take-it-or-leave-it basis. Further, the court found the ban on class-wide arbitration to be substantively unconscionable.

DISCUSSION

I. Existence of Arbitration Agreement

An order compelling arbitration is warranted only upon a finding that "an agreement to arbitrate the controversy exists." (Code Civ. Proc., § 1281.2.) General principles concerning the formation of a contract govern this threshold issue. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.) The appellate court will uphold the trial court's finding on the existence of an arbitration agreement when substantial evidence supports that finding. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.) However, when, as here, the evidence consists entirely of written declarations and documentary evidence, we make a de novo determination of whether the parties agreed to arbitrate their disputes. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co., supra*, 68

Cal.App.4th at p. 89.) We conclude that an agreement to arbitrate exists.

Plaintiff argues that she did not assent to the arbitration agreement because she was unaware of the terms and conditions contained inside the shrink-wrapped box. Certainly a contract is not formed without mutual assent. (Civ.Code, §§ 1550, 1565; *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 993.) However, the existence of mutual assent is determined by objective criteria, not by one party's subjective intent. The test is whether a reasonable person would, from the conduct of the parties, conclude there was a mutual agreement. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.)

This is not a case in which the contractual nature of the document was not obvious to an unsuspecting customer. (Cf. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, *supra*, 25 Cal.App.3d at pp. 993-994.) Plaintiff does not dispute that she entered into a contract with Cingular for the provision of wireless service. Plaintiff admitted in her complaint that she is a customer of Cingular, and she admitted in her declaration that she had activated her wireless service. The complaint expressly alleges that plaintiffs "*entered into written contracts* with Defendants wherein Defendants promised to provide wireless telephone service to Plaintiffs ... in exchange for ... a monthly fee." (Italics added.) Indeed, the causes of action for breach of contract and breach of the implied covenant of good faith rest upon the existence of a contract.

Cingular presented evidence that the shrink-wrapped box had a notice on top cautioning the customer not to open the box until service had been activated. Inside the box was a written document entitled "Terms and Conditions" stating that Cingular "will provide its services on the following Terms and Conditions." The opening paragraph of the written terms and conditions warns in all capital letters that "this

agreement contains mandatory arbitration and other important provisions limiting the remedies available to you in the event of a dispute. Please refer to the section entitled 'Arbitration' for details." Plaintiff presented no evidence to dispute the presence of the arbitration clause. Wing's declaration that she did not recall finding the written terms and conditions in the box with her phone does not negate either her judicial admission that she had a written agreement with Cingular or Cingular's showing on the contents of that written agreement.

The wireless service agreement was a contract of adhesion—a standardized contract imposed upon the subscriber without any opportunity to negotiate the terms. (See generally, *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694; accord *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.) However, a contract of adhesion is nonetheless a valid and existing contract. (28 Cal.3d at p. 819.) Such contracts "are, of course, a familiar part of the modern legal landscape.... They are also an inevitable fact of life for all citizens—businessman and consumer alike." (*Id.* at pp. 817-818, fns. omitted.) A finding of adhesion merely begins another inquiry—whether a particular provision within the contract should be denied enforcement on the ground that it is unconscionable. (*Id.* at pp. 819-827; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, *supra*, 89 Cal.App.4th at p. 1052.)

II. Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of

any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[4] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented—i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz*, *supra*, 24 Cal.4th at p. 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

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[4] The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz*, *supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, *supra*, 89 Cal.App.4th at p. 1056.)

The wireless service agreement here was presented on a take-it-or-leave-it basis, placed inside the shrink-wrapped box along with the telephone. We agree with the trial court's conclusion that the wireless service agreement was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc.*, *supra*, 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at pp. 1533-1534.) We construe the trial court's ruling to include a finding that the July 2003 modification of the arbitration agreement, included as a bill insert, was likewise procedurally unconscionable.[5]

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[5] The trial court phrased its ruling as a finding of substantive unconscionability, but the court's reasoning demonstrates that the basis of the ruling was a finding of procedural unconscionability in that the July 2003 modification was presented on a take-it-or-leave-it basis: "[The July 2003 modification] became effective immediately without providing any reasonable time [for] Wing to cancel the agreement if she disagreed with the new terms."

The ban on class-wide arbitration is present in both the original and the modified versions of the arbitration clause; hence, we need not decide which of the two versions governs plaintiff's dispute. We find it puzzling, however, that plaintiff would challenge the July 2003 modification, inasmuch as the modified arbitration

The more difficult question is whether the ban on class-wide relief is substantively unconscionable. That question was recently examined by our Supreme Court in *Discover Bank*, where the court focused on the exemption that a contract clause banning class action or class arbitration relief may provide to an offending business from liability for its bad business practices. The court said: "[C]lass action waivers found in [adhesive] contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory clauses that are contrary to public policy. As stated in Civil Code section 1668: 'All contracts *which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury* to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.' (Italics added.)" (36 Cal.4th at p. 161.)

While recognizing that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, the court commented that such clauses are "indisputably one-sided." (*Discover Bank*, *supra*, 36 Cal.4th at p. 161.) The court expressly rejected the notion that provisions in the arbitration agreement allowing litigation in small claims court or recovery of attorney fees by the prevailing party are adequate substitutes for the important mechanism of class-wide arbitration. (*Id.* at p. 162.)

The Supreme Court concluded as follows: "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bar-

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clause is more advantageous to her with respect to the rules of arbitration procedure and the payment of arbitration costs.

gaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Discover Bank*, *supra*, 36 Cal.4th at pp. 162-163.)

In the present case, the class arbitration ban appears in a consumer contract for wireless telephone service, a setting expected to involve small amounts of damages. Indeed, the fee for local number portability is alleged to be between 32 cents and $1.25 per month. Does the complaint here allege "*a scheme to deliberately cheat* large numbers of consumers out of individually small sums of money"? We construe the Supreme Court's word "cheat" in light of Civil Code section 1668, which prohibits clauses that exempt the contracting party from liability for *fraud or willful injury*.

Here, the complaint expressly alleges fraud and deceit by AT&T Wireless in that the customers were charged a fee for phone number portability even though portability was not yet available. Pursuant to the rule of *Discover Bank*, we conclude that the class arbitration ban effectively operates to exculpate AT&T Wireless from responsibility for its own willful injury to a large class of consumers, and the class arbitration ban is thereby unconscionable.

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.*

(2003) 29 Cal.4th 1064, 1074-1075.) In the present case, however, the modified version of the arbitration clause precludes severance of the ban on class arbitration: "[T]he arbitrator may not consolidate proceedings or [sic, on] more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and ... *if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.*" (Italics added.) Because we conclude that the specific provision banning class arbitration is unenforceable, we must further conclude that the entire arbitration clause is void.

DISPOSITION

The order denying arbitration is affirmed.

We concur: STEVENS and SIMONS, JJ.

Court of Appeal,
First Appellate District, Division Five – No. A105906
S138745

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAIME WING ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS, LLC,
Defendant and Appellant.

Filed December 14, 2005

Application for stay and petition for review DENIED.

/s/ GEORGE
Chief Justice

JOSEPH W. COTCHETT (#36324)
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NANCY L. FINEMAN (#124870)
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Attorneys for Plaintiffs and the Class

Filed:
March 16, 2004

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

WILLIAM BUCY, MICHAEL C. MITCHELL, JAIME WING, both individually and on behalf of all those similarly situated Plaintiffs, vs. AT&T WIRELESS SERVICES, INC, CINGULAR WIRELESS LLC, SPRINT SPECTRUM L.P., and DOES 1-25; Defendants.	Case No. Civ 432021 *CLASS ACTION* ~~[PROPOSED]~~ ORDER DENYING DEFENDANT CINGULAR WIRELESS SERVICES, LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS DATE: MARCH 11, 2004 TIME: 9:00 AM DEPT.: 1 JUDGE: HON. CAROL L. MITTLESTEADT

Defendant Cingular Wireless LLC's ("Cingular Wireless") Motion for Immediate Stay, Motion to Compel Arbi-

tration and to Stay Proceedings Or, In the Alternative, To Dismiss All Claims Against Cingular ("Motion to Compel Arbitration") came on regularly for hearing on March 11, 2004 before this Court, the Hon. Carol L. Mittlesteadt, presiding. Nancy L. Fineman and Peter E. Borkon of Cotchett, Pitre, Simon & McCarthy appeared on behalf of Plaintiffs and the Class; Donald M. Falk of Mayer, Brown, Rowe & Maw LLP and Amor A. Esteban of Drinker Biddle & Reath LLP appeared on behalf of Cingular Wireless. The Court has reviewed the motion, opposition, reply thereto and considered oral argument from the parties, and good cause appearing therefore, DENIES Defendant Cingular Wireless' Petition for Arbitration and Motion for Stay for the following independent reasons:

1. The Court finds that Cingular Wireless failed to meet its burden in demonstrating that there was an agreement to arbitrate between Plaintiff Jamie Wing ("Wing") and Cingular Wireless.

2. The Court further finds as an independent basis for its decision that the alleged arbitration agreement is unconscionable. The agreement is procedurally unconscionable because it was presented to Wing on a take it or leave it basis. *See Flores v. Transamerica Homefirst, Inc.* (2001) 93 Cal.App.4th 846, 853. The agreement is substantively unconscionable because the contract terms are one-sided in that the alleged agreement became effective immediately without providing any reasonable time to Wing to cancel the agreement if she disagreed with the new terms. *See id.* at 854; *see also Armendariz v. Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83, 117-118. The Court also finds that the agreement is substantively unconscionable because it prohibits arbitrations to be brought in a class or representative proceeding. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094. The Court finds it manifestly unjust not to

allow consumers to bring arbitrations on a class-wide or representative basis.

3. Cingular Wireless' Motion for Stay is Moot.

Having applied the aforementioned reasoning and considering the facts herein Defendant Cingular Wireless' Motion for Immediate Stay, Motion to Compel Arbitration and to Stay Proceedings Or, In the Alternative, To Dismiss All Claims Against Cingular is DENIED

IT IS SO ORDERED

DATED: MARCH 12, 2004

/S/ CAROL L. MITTLESTEADT
Hon. Carol L. Mittlesteadt
Judge of the Superior
Court of California

Signed after review and careful consideration of both sides' proposed orders.

/s/ CLM
3/12/04

Court of Appeal,
First District, Division 5, California.

JAIME WING, ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS, LLC,
Defendant and Appellant.

No. A105906.

(San Mateo County Super. Ct. No. 432021).

May 18, 2005.

Bruce Lee Simon, Cotchett & Pitre, Burlingame, CA, for Plaintiff-Respondents.

Donald M. Falk, Palo Alto, CA, Mayer, Brown, Rowe & Maw LLP, Amor Esteban, Drinker, Biddle & Reath, San Francisco, CA, for Defendant-Appellant.

JONES, P.J.

Plaintiff Jaime Wing and two coplaintiffs, William Bucy and Michael Mitchell, filed suit against Cingular and other wireless service providers to challenge the practice of charging customers a fee for local number portability. Of the three named plaintiffs, only Wing is a customer of Cingular. Cingular petitioned to compel arbitration of plaintiff Wing's claims based upon an arbitration clause included among the terms and conditions of the wireless service agreement.[1] The

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[1] The plaintiffs' lawsuit named other wireless service providers as well, but this appeal concerns only Cingular. Appeals by other service providers arising from the same lawsuit are pending before us in *Bucy v. AT&T*, A105910, and *Mitchell v. Sprint*, A105911. Cingular sought to compel arbitration only by plaintiff Wing because Wing is the only named plaintiff who is a Cingular customer.

trial court denied the petition, citing two grounds: (1) Cingular failed to establish the existence of an agreement to arbitrate between Cingular and Wing, and (2) the alleged arbitration agreement is unconscionable and unenforceable. In this appeal by Cingular, we reverse the order denying arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Wing purchased a wireless telephone from the Costco store in South San Francisco in April 2001. The phone came in a shrink-wrapped box inside a cardboard sleeve, and on that cardboard sleeve were instructions for activating wireless service with Cingular. Beneath the shrink wrap on top of the box were several documents, including a notice advising the customer not to open the box until service had been activated. Also on top of the box were a welcome letter, the written terms and conditions of Cingular's wireless service, and a handbook of Cingular services. The written terms and conditions of Cingular's wireless service included an arbitration clause requiring arbitration of all disputes arising out of the wireless service agreement.

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Plaintiff argues that she did not assent to the arbitration agreement because she was unaware of the terms and conditions contained inside the shrink-wrapped box. Certainly a contract is not formed without mutual assent. (Civ.Code, §§ 1550, 1565; *Windsor Mills, Inc. v. Collins & Aikman Corp.*

(1972) 25 Cal.App.3d 987, 993.) However, the existence of mutual assent is determined by objective criteria, not by one party's subjective intent. The test is whether a reasonable person would, from the conduct of the parties, conclude there was a mutual agreement. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1050.)

This is not a case in which the contractual nature of the document was not obvious to an unsuspecting customer. (Cf. *Windsor Mills, Inc. v. Collins & Aikman Corp.*, *supra*, 25 Cal.App .3d at pp. 993-994.) Plaintiff does not dispute that she entered into a contract with Cingular for the provision of wireless service. Plaintiff admitted in her complaint that she is a customer of Cingular, and she admitted in her declaration that she had activated her wireless service. The complaint expressly alleges that plaintiffs "*entered into written contracts* with Defendants wherein Defendants promised to provide wireless telephone service to Plaintiffs ... in exchange for ... a monthly fee." (Italics added.) Indeed, the causes of action for breach of contract and breach of the implied covenant of good faith rest upon the existence of a contract.

Cingular presented evidence that the shrink-wrapped box had a notice on top cautioning the customer not to open the box until service had been activated. Inside the box was a written document entitled "Terms and Conditions" stating that Cingular "will provide its services on the following Terms and Conditions." The opening paragraph of the written terms and conditions warns in all capital letters that "this agreement contains mandatory arbitration and other important provisions limiting the remedies available to you in the event of a dispute. Please refer to the section entitled 'Arbitration' for details." Plaintiff presented no evidence to dispute the presence of the arbitration clause. Wing's declaration that she did not recall finding the written terms and conditions in the box with her phone does not negate ei-

ther her judicial admission that she had a written agreement with Cingular or Cingular's showing on the contents of that written agreement.

The wireless service agreement was a contract of adhesion—a standardized contract imposed upon the subscriber without any opportunity to negotiate the terms. (See generally, *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694; accord *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 817.) However, a contract of adhesion is nonetheless a valid and existing contract. (28 Cal.3d at p. 819.) Such contracts "are, of course, a familiar part of the modern legal landscape.... They are also an inevitable fact of life for all citizens—businessman and consumer alike." (*Id.* at pp. 817-818, fns. omitted.) A finding of adhesion merely begins another inquiry—whether a particular provision within the contract should be denied enforcement on the ground that it is unconscionable. (*Id.* at pp. 819-827; see *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, *supra*, 89 Cal.App.4th at p. 1052.)

II. Unconscionability

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[4] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense.

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[4] The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

(*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)[5]

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented—i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz*, *supra*, 24 Cal.4th at p. 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts em-

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[5] It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.)

ploy a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc., supra*, 89 Cal.App.4th at p. 1056.)

The wireless service agreement here was presented on a take-it-or-leave-it basis, placed inside the shrink-wrapped box along with the telephone. We agree with the trial court's conclusion that the wireless service agreement was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1533-1534.) We construe the trial court's ruling to include a finding that the July 2003 modification of the arbitration agreement, included as a bill insert, was likewise procedurally unconscionable.[6]

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[6] The trial court phrased its ruling as a finding of substantive unconscionability, but the court's reasoning demonstrates that the basis of the ruling was a finding of procedural unconscionability in that the July 2003 modification was presented on a take-it-or-leave-it basis: "[The July 2003 modification] became effective immediately without providing any reasonable time [for] Wing to cancel the agreement if she disagreed with the new terms."

The ban on class-wide arbitration is present in both the original and the modified versions of the arbitration clause; hence, we need not decide which of the two versions governs plaintiff's dispute. We find it puzzling, however, that plaintiff would challenge the July 2003 modification, inasmuch as the modified arbitration clause is more advantageous to her with respect to the rules of arbitration procedure and the payment of arbitration costs.

The more difficult question is whether the ban on class-wide relief is substantively unconscionable.[7] That issue was addressed in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, which held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. In that case the plaintiff was a credit cardholder who alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szeleta* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers ... from seeking redress for relatively small amounts of money, such as the $29 sought by Szeleta. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szeleta, supra*, 97 Cal.App.4th at p. 1101.)

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[7] The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra*, 24 Cal.4th at pp. 117-121.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc., supra*, 29 Cal.4th at p. 1073 [allowing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 855 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].) However, not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at p. 1536; accord, *Armendariz, supra*, 24 Cal.4th at p. 117.)

Here, it is true that the ban on class-wide arbitration tends to favor Cingular; the obvious effect is to limit the scope of potential damages that Cingular would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. Class actions through *litigation* are necessarily precluded by the agreement to arbitrate. The limitation is only on the breadth of the arbitration proceeding—i.e., the *manner* in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela*. The arbitration clause here expressly permits the customers to obtain relief in small claims court.[8] Moreover, the costs of arbitra-

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[8] Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would

tion are entirely borne by Cingular. Unlike the credit cardholders in *Szetela*, Cingular's customers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

Our analysis does not end there, however. The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable, and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra*, 24 Cal.4th at p. 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90; *Cruz v. PacifiCare Health Systems, Inc* (2003) 30 Cal.4th 303 [UCL and False Advertising Act]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1084 [Consumer Legal Remedies Act].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90; *Armendariz, supra*, 24 Cal.4th at pp. 99-104.) In *Armendariz*, the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees—recovery that would otherwise have been available un-

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be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szeleta, supra*, 97 Cal.App.4th at p. 1096.)

der FEHA. The Supreme Court held the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1539-1540 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir.1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

The *Szeleta* court apparently relied upon this principle in finding that the contractual ban on class arbitration violates public policy. The *Szeleta* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof.Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a 'get out of jail free' card while compromising important consumer rights." (*Szeleta, supra*, 97 Cal.App.4th at p. 1101.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL are arbi-

trable even though such claims vindicate important statutory rights.[9] What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held *permissible* when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v. Superior Court* (1982) 31 Cal.43d 584, 609-614, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444; *Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at pp. 318-319.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration.

Arbitration is meant to resolve *private* disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans, supra*, 21 Cal.4th at p. 1080.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp.*,

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[9] The California Supreme Court has held that claims under the UCL for *injunctive relief* to benefit the general public are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at pp. 315- 316; see also *Broughton v. Cigna Healthplans, supra*, 21 Cal.4th at pp. 1079-1082 [claims for injunctive relief under the Consumer Legal Remedies Act].) Cingular conceded below and acknowledges on appeal that plaintiff's claims for injunctive relief are not arbitrable under existing precedent. The only question before us, then, is whether plaintiff's claims for monetary damages and restitution of the local number portability fees are arbitrable.

supra, 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims." (*Iberia Credit Bureau v. Cingular Wireless* (5th Cir.2004) 379 F.3d 159, 174.)

DISPOSITION

The order denying arbitration is reversed, and the trial court is directed to enter a new order compelling arbitration on an individual basis. The parties shall bear their own costs on appeal.

We concur: STEVENS and SIMONS, JJ.

Court of Appeal,
First Appellate District, Division Five – No. A105906
S134834

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAIME WING ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS LLC,
Defendant and Appellant.

Filed August 24, 2005

Petition for review GRANTED.

The matter is transferred to the Court of Appeal, First Appellate District, Division Five, with directions to vacate its decision and to reconsider the matter in light of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.

Werdegar, J., was recused and did not participate.

/s/ GEORGE
Chief Justice

/s/ KENNARD
Associate Justice

/s/ BAXTER
Associate Justice

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Associate Justice

/s/ CHIN
Associate Justice

/s/ MORENO
Associate Justice